No. 84-1614

Office-Supreme Court,
FILED
MAY 16 1985
ALEXANDER L. STEV
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES CAMPBELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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Printed by Authority of the State of Illinois (P.O. 32859—55—5-16-85)

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner received a fair trial where two alternate jurors replaced jurors who indicated they would be unable to serve for the duration of the trial because of a one week delay occurring after they were informed that the trial would last only one week.

2. Whether the substitution of jurors constitutes the type of trial interruption discussed by this Court in *Arizona v. Washington*, 434 U.S. 497 (1981), and *United States v. Jorn*, 400 U.S. 470 (1971).

3. Whether the Illinois Appellate Court correctly determined that petitioner waived any allegation of juror bias on appeal where he failed to make any attempt to show such bias at trial.

4. Whether petitioner received a fair trial where a juror who stated a bias in his favor was allowed to serve on the jury after the juror indicated that she could fairly decide the question of petitioner's guilt.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Charles Campbell ("petitioner") was charged by indictment with 2 counts of armed robbery and with one count each of attempt (murder), aggravated battery and armed violence. *Ill. Rev. Stat.*, 1981 ch. 38, secs. 18-2, 8-4(a), 9-1(a)(1), 12-4(b)(1), 12-4(a) and 33A-2. His cause was severed from that of co-defendants Maverick and Sammy Tyler and he was tried separately.

A jury was selected and the cause proceeded to trial. On the first day of trial the jury heard opening statements

and the testimony of one prosecution witness. Prior to the next day's proceedings the trial judge, Harry D. Strouse, Jr., became ill and the trial was postponed. Judge Strouse was gone seven days, during which time petitioner was given the option of 1) accepting a mistrial, 2) continuing the case before another judge or 3) waiting for Judge Strouse's return. Petitioner elected to wait for Judge Strouse.

During the delay, two jurors contacted the Chief Circuit Judge and asked to be excused from the jury because of their inability to serve during a second week of proceedings. The jurors indicated that they were advised during jury selection that the trial would last no more than a week. Chief Judge Hoogasian excused the jurors and ordered that the alternate jurors be seated. This substitution occurred without notice to the parties.

When the trial resumed petitioner moved for a mistrial based on the substitution of the jurors. The following exchange then occurred:

> THE COURT: I think the problem was, when I got sick, when I talked to [the prosecutor], I told [him] it would seem to me there were three options, one is to grant a mistrial and start over, one is to continue the case before Judge Hoogasian, and of course, the other is just to wait until I come back.
>
> PROSECUTOR: And I thought I had expressed all three of those.
>
> THE COURT: He said he had talked with you [defense counsel] and given [counsel] the options . . . .
>
> DEFENSE COUNSEL: I don't see any serious prejudice. (R. 511)

Petitioner's trial then resumed and proceeded to a conclusion. Petitioner has not challenged the sufficiency of the evidence proving his guilt. That evidence established that

on the evening of September 15, 1982, petitioner, who carried a sawed-off shotgun, and two other men approached Kenneth Kleinworth and Joseph Dindlebeck, sailors stationed at the Great Lakes Naval Center in North Chicago, Illinois, and announced a robbery. Petitioner repeatedly jabbed Kleinworth with the gun and threatened "to blow [him] away, if [he] didn't move." Although Kleinworth complied with petitioner's command, petitioner then fired a shot which hit Kleinworth in the upper inside portion of his left thigh. Petitioner took Kleinworth's wallet and all three robbers fled. Both Kleinworth and Dindlebeck identified petitioner as the gunman.

During the defense case petitioner's mother, Essie Collins, testified on his behalf. Subsequently, juror Nancy Orsini informed the trial court that Mrs. Collins' husband was employed by her (Orsini's) husband. Orsini indicated that she was not aware of the relationship until Mrs. Collins testified and that she did not mention the matter to any of the other jurors. The trial judge then questioned Mrs. Orsini outside the presence of the other jurors. When the judge asked Mrs. Orsini if the relationship would influence her in the case, she responded: "Oh yes, yes, yes. I mean, that all, all of the relatives have worked for my husband at one point or another." Orsini subsequently indicated that she could serve in a fair and impartial manner. (R. 747-48) Petitioner's motion for a mistrial, based on Orsini's presence on the jury, was denied and she served to the conclusion of trial. Petitioner was found guilty as charged. He was sentenced to concurrent prison terms of sixty (60) years for armed robbery and armed violence.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS NOT DENIED A FAIR TRIAL BY THE TRIAL COURT'S DECISION TO SEAT TWO ALTERNATE JURORS WITHOUT NOTICE TO DEFENDANT WHERE THE RECORD DEMONSTRATES THAT PETITIONER'S PRESENCE WOULD NOT HAVE ALTERED THE COURT'S RULING, WHICH WAS CORRECT UNDER ILLINOIS LAW. IN ADDITION, THE SUBSTITUTION OF JURORS DOES NOT CONSTITUTE THE TYPE OF TRIAL INTERRUPTION CONSIDERED BY THIS COURT IN *ARIZONA v. WASHINGTON,* 434 U.S. 497 (1981), AND *UNITED STATES v. JORN,* 400 U.S. 470 (1971).

Petitioner argues that he was denied a fair trial where, outside the presence of petitioner and counsel, two jurors were excused by a judge other than the one presiding over his trial. (Pet. at 9) Respondent contends that petitioner was not prejudiced by the procedure where his presence could not have altered the trial court's ruling and where the alternates who were seated were approved of by petitioner, who did not exhaust available peremptory challenges during the jury selection procedure.

Petitioner argues that, "[t]he circumstances of the [jurors] removal were never made clear," (Pet. at 9), and that, "[a]s of this writing, petitioner is unclear on just how or why this panel was broken." (Pet. at 10) Petitioner also states that, "[s]ome judge other than the trial judge" excused the two jurors. (Pet. at 9). Actually, as the Illinois appellate court recognized, the circumstances surrounding the substitution of the jurors are clear from the record.

Relying on the trial court's post-trial summary of events, the appellate court specifically found that during

the delay occasioned by the trial judge's illness, two jurors called the chief judge and asked to be excused because they would be unable to serve on the jury during a second week of proceedings made necessary by the delay. The jurors indicated that they had been told that they would be required to serve only a week at the time they were selected. *People v. Campbell*, 126 Ill. App. 3d 1028, 467 N.E.2d 1112, 1120 (2d Dist. 1984). At that time the chief judge excused both jurors and ordered that the alternates be seated.

Based on his misunderstanding of the facts, petitioner argues, relying on *People v. Payton*, 2 Ill. App. 3d 693, 276 N.E.2d 775 (5th Dist. 1971), that the trial court "arbitrarily substitute[d] alternate juror[s]." 2 Ill. App. 3d at 698. However, the court's decision was not arbitrary, but rather was based on the jurors' representations that they could not serve on the jury during a second week of trial after they were advised that the trial would last only one week.

Petitioner next argues that he was denied a fair trial because he was not present when the two jurors were excused. Respondents agree that petitioner or counsel should have been present when the jurors were excused. However, courts have repeatedly held that such an error is harmless beyond a reasonable doubt where the record establishes that the accused's presence could not have altered the outcome of the proceedings. See: *Ware v. United States*, 376 F.2d 717 (7th Cir. 1967); *United States v. Brown*, 571 F.2d 980, 987 (6th Cir. 1978); *United States v. Arriagada*, 451 F.2d 487, 489 (4th Cir. 1971), *cert. denied*, 405 U.S. 1018 (1971). In the present case, where good cause was shown, petitioner's presence could not have altered the trial court's ruling. *Henderson v. Lane*, 613 F.2d 175, 178 (7th Cir. 1980); *United States v.*

Garofolo, 385 F.2d 200 (7th Cir. 1967), *vac'd on other grounds*, 390 U.S. 144 (1968). The appellate court recognized this, holding:

> Whether defendant was present or not, the replacement of a regular juror with an alternate juror was a matter solely within the discretion of the trial court. Defendant's presence or lack of it was not a factor likely to have an effect on the court's decision; therefore, although perhaps "better procedure" would have called for it, defendant's presence was unnecessary. (See *People v. Harvey*, 95 Ill. App. 3d 992, 998, 51 Ill. Dec. 231, 420 N.E.2d 645.) Defendant has not shown prejudice as the result of the absence which would require reversal. 95 Ill. App. 3d 992, 51 Ill. Dec. 231, 420 N.E.2d 645.

467 N.E.2d at 1121. Because petitioner was not prejudiced and has not alleged prejudice in this Court, it is clear that petitioner was not denied a fair trial. *Henderson v. Lane*, 613 F.2d 175, 179 (7th Cir. 1980); *United States v. Freed*, 460 F.2d 75 (10th Cir. 1972); *United States v. Jurgenson*, 451 F.2d 516 (10th Cir. 1971).

Citing this Court's decisions in *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 917 (1978), and *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), petitioner argues that he was denied the "right to have his trial completed by a particular tribunal." *Washington, supra*, 434 U.S. at 503. Respondent contends that those decisions do not support petitioner's argument where they involve allegations of unfairness resulting from the declaration of a mistrial on the prosecution's motion and over the defendant's objection.

In *Washington*, this Court noted that in such situations:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs

> the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent victim may be convicted. The danger of unfairness exists whenever a trial is aborted before it is completed.

434 U.S. at 503-04.

In *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), the defendant was charged with willfully assisting in the preparation of fraudulent income tax returns. At trial, the prosecution called as witnesses a number of persons the defendant had assisted in preparing their income tax returns. The trial court instructed these persons to confer with counsel prior to testifying and discharged the jury. The court subsequently ruled that re-trial was barred on double jeopardy grounds. U.S. CONST., amend. V.

This Court noted probable grounds in order to consider the question of, "in what circumstances re-trial is to be precluded when the initial proceedings are aborted prior to verdict without the defendant's consent." 400 U.S. at 480. This Court concluded that because the trial court abused its discretion in declaring a mistrial without the defendant's consent, a second trial would violate the prohibition against double jeopardy. 400 U.S. at 487.

Contrary to petitioner's assertion, it is clear that these decisions are relevant only when a prosecution is "aborted" without the consent of the accused. In the present case the prosecution was not "aborted", but rather proceeded once the trial court returned from its illness. It is also clear that under the factors discussed in *Washington* petitioner here was not prejudiced by the decision to replace the jurors, for neither the petitioner's financial nor emotional burden was increased, the trial was not prolonged and there was no danger of unfairness. For

these reasons it is clear, under this Court's decisions in *Jorn* and *Washington*, petitioner was not deprived of his constitutionally protected right to trial before a single tribunal.

Petitioner here used only seven (7) of twelve (12) peremptory challenges allowed by statute. *Ill. Rev. Stat.* 1981, ch. 38, secs. 115-4(e), (g). As a result, Illinois law is clear that petitioner cannot complain prejudice resulting from the seating of the alternate jurors when he could have excused them peremptorily. *People v. Ford*, 19 Ill. 2d 466, 168 N.E.2d 33 (1961); *People v. Feagans*, 118 Ill. App. 3d 991, 455 N.E.2d 871 (4th Dist. 1983); *People v. Townes*, ____ Ill. App. 3d ____, 474 N.E.2d 1334 (4th Dist. 1985).

Petitioner argues that the appellate court holding "would permit a trial judge (or as here, any judge) to seat alternates at whim." (Pet. at 12) This conclusion is erroneous and ignores the specific facts predicating the appellate court's decision. The appellate court recognized that the trial court had discretion to seat the alternate jurors beause it was beyond dispute that the original jurors were properly excused. For this reason the trial judge did not replace the jurors "at whim," but rather proceeded for good cause. 471 N.E.2d at 1121-22.

For these reasons, petitioner has failed to demonstrate why he was denied a fair trial and therefore why certiorari is proper in this case.

II.

PETITIONER HAS WAIVED ANY CONTENTION OF ERROR BASED ON THE JURY SERVICE OF JUROR NANCY ORSINI WHERE HE NEGLECTED TO DISCLOSE THE NAMES OF HIS WITNESSES DURING VOIR DIRE AND WHERE HE DID NOT ATTEMPT TO DEMONSTRATE PREJUDICE RESULTING FROM THE TRIAL COURT'S DECISION TO ALLOW ORSINI TO SERVE ON THE JURY. IN ADDITION, PETITIONER RECEIVED A FAIR TRIAL WHERE ORSINI ORIGINALLY INDICATED A BIAS IN HIS FAVOR AND AFTER QUESTIONING BY THE TRIAL COURT INDICATED THAT SHE COULD SERVE FAIRLY AND IMPARTIALLY.

Petitioner argues that he was denied his sixth amendment right to a fair trial where, during petitioner's case-in-chief, juror Nancy Orsini, who discovered that she knew petitioner's mother and stepfather and expressed a resulting bias in favor of petitioner, was allowed to remain on the jury. Respondent contends that petitioner received a fair trial where Orsini was allowed to serve only after she stated that she could serve in a fair and impartial manner. In addition, petitioner was placed at a distinct advantage by Orsini's presence on the jury and therefore cannot complain that he was denied a fair trial. For these reasons respondent contends that certiorari is not proper in this case.

Petitioner has failed to fully present the facts surrounding the trial judge's decision to allow juror Orsini to remain on the jury. Actually, after Orsini indicated that she knew petitioner's mother and stepfather, the matter was discussed by the parties, with petitioner moving for a mistrial. The following exchange then occurred:

> THE COURT: Your obligation at the outset, and we do our best to tell you who is going to be on the case, and unfortunately in this case, it was not good enough, buy your obligation is to be a good juror.

MRS. ORSINI: Okay.

THE COURT: We expect you to do no more or no less than to do your job, to its fullest, however that may be.

MRS. ORSINI: All right.

(R. 747-48)

Initially, certiorari is not proper in this case where, as the appellate court recognized, petitioner waived the issue at trial. This Court has repeatedly recognized that it is the accused's burden to demonstrate juror bias. See: *Reynolds v. United States*, 98 U.S. 145, 157 (1878); *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Glasser v. United States*, 315 U.S. 60, 87, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942). In the present case juror Orsini merely indicated that she would be "influenced" by her relationship with petitioner's family. At that point in the proceedings petitioner bore the burden of demonstrating that he could not receive a fair trial while Orsini sat on the jury. Petitioner did not attempt to make such a showing. For this reason the appellate court correctly determined that petitioner waived the issue presented here (407 N.E.2d at 1123) and therefore certiorari should be denied.

It is equally clear that petitioner was not denied a fair trial where the record indicates that the trial court correctly refused to disqualify juror Orsini. This Court has recognized that, in determining juror bias, the relevant inquiry is whether the jurors have, "such fixed opinions that they [cannot] judge impartially the guilt of the defendant." *Patton v. Yount*, ____ U.S. ____, 104 S.Ct. 2885, 2891 (1984). See: *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

This Court has further noted that, "the trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Bose Corp. v. Consumers Union of U.S., Inc.*, ____ U.S. ____, ____, 104 S.Ct. 1949, 1960, 80 L.Ed.2d 502 (1984). This is especially true where the juror in question has been questioned by the trial court and the parties concerning any potential bias. *Patton v. Yount*, 104 S.Ct. at 2892, n. 13.

In the present case, the trial court found that bias was not shown where juror Orsini indicated that she, "would be able to do her duty in this job, regardless of her feelings about the family and [that] she could be fair and impartial." *People v. Campbell, supra*, 467 N.E.2d at 1123. Petitioner has failed to allege any facts which demonstrate that the trial court's ruling was not correct.

Petitioner cites *People v. Hamilton*, 100 Ill. App. 3d 942, 427 N.E.2d 388 (1st Dist. 1981), for the principle that, "[i]mpartiality requires not only freedom from bias against the accused and for the prosecution, but also freedom from bias for the accused and against the prosecution." 100 Ill. App. 3d at 949, 427 N.E.2d at 394. (citations omitted) A closer reading of *Hamilton* indicates that it does not support petitioner's argument. There, the defendant argued that prospective jurors were improperly excluded under this Court's decision in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The appellate court held that the exclusion of the jurors based on *Witherspoon* did not violate the defendant's right to a jury selected from a fair cross-section of the community because the defendants had no constitutional right to be tried by jurors based in their favor. 100 Ill. App. 3d at 949. It does not follow that a defendant who in fact is allowed to seat a juror biased in his favor is denied a fair

trial. For the same reasons, petitioner's citation to *Hayes v. Missouri*, 120 U.S. 68 (1887), and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1981), does not control the present case.

The case of *United States v. Baca*, 494 F.2d 424 (10th Cir. 1974), also cited by petitioner, does not support his position, for there the juror involved indicated unequivocally that she could not serve impartially. 494 F.2d at 427-28. The present case is distinguishable because of juror Orsini's indication that she could remain impartial. See: *People v. Campbell*, 467 N.E.2d at 1123.

This Court has indicated that, in reviewing the trial court's decision concerning the substitution of jurors, it is necessary to consider whether the court's ruling preserves the "essential feature" of the jury, which is:

> [T]he interposition between the accused and the accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence.

Williams v. Florida, 399 U.S. 78, 100, 90 S.Ct. 1892, 26 L.Ed.2d 446 (1970). In the present case the trial court's decision to allow Orsini to remain on the jury after she indicated that she could serve fairly and impartially did in fact preserve the essential feature. As a result petitioner received a fair trial and certiorari should not be granted in this case.

CONCLUSION

For these reasons, respondent requests this Honorable Court to deny the Petition for Writ of Certiorari in the above-entitled cause.

Respectfully submitted,

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